Supreme Court of the United States

October Term, 1976

No. 76-577

HUGO ZACCHINI,
Petitioner,

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

JOHN G. LANCIONE
SPANGENBERG, SHIBLEY, TRACI
AND LANCIONE
1500 National City Bank Building
Cleveland, Ohio 44114
Attorneys for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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OPINIONS BELOW

The opinion of the Ohio Supreme Court, appended at page A2 of the Petition for Certiorari, is reported at 47 Ohio St. 2d 224, ... N.E.2d .....

The opinion of the Eighth District Court of Appeals of the State of Ohio (A27) of Petition for Certiorari is unreported.

No written opinion was entered by the trial court in the Court of Common Pleas for Cuyahoga County, Ohio.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Ohio was entered on July 28, 1976, under docket number 75-995.

The petition for writ of certiorari was filed on October 23, 1976, and granted on January 10, 1977. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

QUESTION PRESENTED

Where a performer has a protected "right of publicity" —the right of exclusive control over the publication of his professional affairs—and that right is held as a matter of state law to have been infringed by a television station's filming of the performer's entire act over his specific objection and the broadcasting thereof on a nightly news show, to what extent, if at all, should the television station's tortious conduct be immunized by the First Amendment of the United States Constitution.

STATEMENT OF THE CASE

The entire record in this action consists of plaintiff's complaint, defendant's answer and defendant's motion for summary judgment supported by two affidavits and an exhibit.

Plaintiff's complaint (App. p. 4), filed July 2, 1973, alleged that he is in the entertainment business; that he performs an act originated by his father and performed only by his family for fifty years; that while appearing at the Burton Fair he was approached by an employee of defendant with regard to filming his act and he requested that the performance not be filmed; that notwithstanding such request his entire performance was filmed and shown on defendant's television station; that "the defendant showed and commercialized the film of his act without his consent and such conduct by the defendant was an unlawful appropriation of plaintiff's professional property".

Defendant's answer (App. p. 5) admitted that plaintiff's performance had been filmed and broadcast. In separate defenses the answer challenged the sufficiency of the complaint to state a claim upon which relief can be granted, and alleged that its conduct was protected "by the rights of freedom of speech and freedom of the press as contained in that Constitution of the United States and the State of Ohio".

On March 11, 1974, defendant filed a motion for summary judgment (App. p. 7). That motion was supported by two affidavits and an exhibit.

The first affidavit (App. p. 8) was from George J. Masur, the representative of defendant who was respon-

sible for plaintiff's act having been filmed. The affiant stated that while at the Burton Fair on August 30, 1972 he had witnessed plaintiff's performance which "consisted of him being shot out of a cannon into a net located approximately 200 feet away". The affidavit reflects that plaintiff and Mr. Masur discussed the filming of plaintiff's act, that "plaintiff requested that his act not be filmed", and that Mr. Masur responded "although I did not intend to do so that day he had no right to restrict my right to film a newsworthy event". The following day Mr. Masur reported on his activities to the producer of defendant's Eyewitness News program, including plaintiff's stated objection to any filming, and he was directed to return to the fair and film plaintiff's performance. He did so, and submitted the film for use on that evening's eleven o'clock Eyewitness News.

The second affidavit (App. p. 11) was by David F. Patterson, a co-anchorman on the eleven o'clock Eyewitness News program. He stated that on the broadcast of September 1, 1972 a fifteen second news clip of plaintiff's act was telecast, and identified the script text he read while the film clip was being shown. The script was appended as an exhibit to the Patterson affidavit (App. p. 12).

On April 29, 1974 an entry issued from the trial court granting defendant's motion for summary judgment. However, no opinion was issued upon such ruling so we do not have the benefit of the trial court's reasoning.

Plaintiff prosecuted an appeal to the Eighth District Court of Appeals. In that proceeding it was asserted by plaintiff that "appellee's conduct is not protected by the First Amendment", thus raising the question presented herein. On July 10, 1975 the Court of Appeals reversed the decision of the trial court. While the ruling of the

three judges was unanimous, two separate opinions were rendered which proceeded on somewhat different grounds. Quite candidly, the opinions of the two judges went well beyond the issues which were briefed and argued, and certain of the points upon which reversal was based originated with the court.

Defendant then sought review in the Supreme Court of Ohio. In that proceeding defendant asserted a claim of federal constitutional privilege as a defense to plaintiff's asserted rights. On July 28, 1976, the Ohio Supreme Court issued its decision. The syllabus of opinion (through which the court officially speaks, 14 O. JUR. 2d, *Courts* §247) is as follows:

> 1. One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy, and the use or benefit need not necessarily be commercial.
>
> 2. The performer of a "human cannonball" act has a right to the publicity value of his performance, and the appropriation of that right over his objection without license or privilege is an invasion of his privacy.
>
> 3. A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.

In the course of the court's opinion the rationale of the Court of Appeals (and particularly those matters raised *sua sponte*) as to the foundation for an actionable claim

for relief by plaintiff were essentially rejected. The Ohio Supreme Court posed the controlling issues as it perceived them to be:

> Did the videotaping and broadcasting over his objection of plaintiff's entire act constitute that form of invasion of privacy referred to as appropriation of a plaintiff's name and likeness and if so, was the television station privileged to do so? 47 Ohio St. 2d 224, 228.

As to the first proposition, it was held that the defendant's conduct constituted an actionable tort in Ohio. The right which the court found infringed was the "right of publicity", the first time such right had been recognized in Ohio. On this aspect of the action the court concluded as follows:

> It is this right, a right of exclusive control over the publicity given to his performances, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection, contrary to the holding of some earlier cases. See, *e.g., Gautier v. Pro-Football* (1952), 304 N.Y. 354, 107 N.E.2d 485; *O'Brien v. Pabst Sales Co.* (C.A. 5, 1942), 124 F.2d 167.
>
> We may assume that a right of publicity inheres in a performer, at least to the extent that the performer has not abandoned the right by effectively dedicating it to the public in whole or in part, or has failed to give reasonable notice to the public, and we need not consider when the right is abandoned or lost under the facts of this case. We may reasonably assume that the plaintiff's performance of his act in a county fair was not such an abandonment of his right of

> publicity that anyone might over his stated objection and without license or privilege, film the performance and broadcast the film to millions of viewers in the area. 47 Ohio St. 2d 224, 232.

The court then proceeded to "the decisive issue in this case"—"whether the defendant had a privilege to film and televise the plaintiff's performance on its nightly news program, and if so whether that privilege was abused". For guidance on that issue the court turned to the rulings in *Time, Inc. v. Hill,* 385 U.S. 374 (1967) and *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Based upon its analysis of those authorities the court concluded that defendant was entitled, *as a matter of law,* to immunity under a claim of privilege for its tortious conduct. Drawing from the two cited authorities the concept that the news media possesses a privilege to disseminate news of matters of public interest the court concluded thusly:

> . . . it is clear that a public performance in a county fair is a matter of legitimate public interest, just as the opening of a new play was held to be. Plaintiff argues by implication that the TV broadcast infringed upon his rights because it showed his entire performance, and that the taking of his whole act, albeit one which only lasts a few seconds, is equivalent to the broadcast of an entire play or the publication, and thus passes the limits of any rights of reporting or fair comment. From the performer's point of view, that position is, of course, understandable, for a film or a videotape of a performance comes very close to actually reproducing the performance itself. However, the primary value which one society places upon freedom of speech and of press requires that we reject that viewpoint. The press, if it is to be able to freely report matters of public interest, must

be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. *No fixed standard which would bar the press from reporting or depicting an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the "breathing room" in reporting which freedom of the press requires.* The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to eport the performance, but, rather, to appropriate the erformance for some other private use, or if the actual intent was to injure the performer. (Emphasis added.) 47 Ohio St. 2d 224, 235.

Justice Celebrezze dissented. He asserted that the majority's reliance upon the *Time, Inc. v. Hill* and *New York Times* rulings was conceptually improper, and that even if relevant, the failure to consider the effect of the later decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), undermined the conclusion reached by the majority. He further disagreed with the majority's determination that final judgment was proper, pointing out five factual issues which he maintained precluded a determination that defendant was entitled to summary judgment as a matter of law.

SUMMARY OF ARGUMENT

The Supreme Court of Ohio, while recognizing a new common law cause of action for the appropriation for private use or benefit the name or likeness of another by way of the right to the publicity value inherent in

a professional performer's act, improperly applied First Amendment immunities to a T.V. station that broadcast a performer's entire performance on its nightly news program. The basis for decision of the Ohio Supreme Court was that the T.V. station had the privilege to report in its newscast matters of legitimate public interest unless the reporting was for some nonprivileged private use or done with actual malice. The reasoning of that Court is fundamentally unsound because there does not exist any right for the broadcast media to publish an *entire* performance of a professional performer on its news program under the protection of any yet recognized interpretation of First Amendment rights as applied to newsworthy events of legitimate public interest.

The First Amendment protections granted to the news media have been principally in cases involving defamation and traditional invasion of privacy, wherein false light matters and matters that are not before the public are improperly put there. The right of publicity is a new and different branch of the traditional right of privacy branches. The right of publicity involves a proprietary right inherent in the entire "act" or "performance" of a professional entertainer. It is the right to govern how, when, where, for what remuneration and under what circumstances a professional entertainer's entire act is to be published. It is the right of a performer to protect against an unauthorized publication of his entire professional performance which could diminish its originality, and its commercial value, and this is easily distinguishable from a right to protect against the publication of private matters or of publication of matters in a false light or of defamation.

There is no question that the broadcast media has the privilege and right to report newsworthy events of

public interest and wide latitude to criticize and comment thereupon. However, there can be no privilege for a complete appropriation by filming and broadcasting in its entirety on a "news" program an entertainer's performance under the guise of newsworthiness and matters of legitimate public interest.

ARGUMENT

I. Introduction

Insofar as petitioner has been able to determine this action presents a question of first impression nationally[1]—what is the proper scope of the First Amendment privilege to be extended to the electronic broadcast media in defense of a claim of appropriating a performer's right of publicity. Petitioner contends that the Ohio Supreme Court's reliance on *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964),[2] for guidance is erroneous. Primarily, the considerations which pertain to this suit for invasion of a "right of publicity" are so dissimilar to those presented in the foregoing authorities as to render the precedents of marginal value. Even as-

1. *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970) and *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952), which bear some factual resemblance to this suit, are distinguishable in that each turns upon the construction of §51 of the New York Civil Rights Law, Consol. Laws, c.6, which was held to afford no protection against invasions of the right of publicity and/or waiver by the plaintiff of any right of publicity. Thus, the question presented herein was not reached in those actions.

2. Although defendant interposed Article I, Section 11 of the Ohio Constitution in defense of plaintiff's claim it is beyond argument that the decision of the Ohio Supreme Court is premised upon First Amendment considerations as announced in those decisions.

suming some direct relevance for *Time, Inc. v. Hill*, the Ohio Supreme Court erred in failing to recognize that its scope has been substantially affected by later decisions of this Court. Petitioner submits that this action represents an appropriate vehicle for a fresh look at *Time, Inc. v. Hill* and its continuing viability.

II. The Ohio Supreme Court Has Extended Virtual Total Immunity Under the First Amendment for Tortious Invasion of the Right of Publicity

Before undertaking critical analysis of the validity of the Ohio Supreme Court's application of the First Amendment principles enunciated in *New York Times v. Sullivan, supra*, and *Time, Inc. v. Hill, supra*, to this suit, it is essential to consider other aspects of the state court decision.

By the decision in this case Ohio has, for the first time, recognized as a matter of state law a protected "right of publicity",—the right of exclusive control in a performer over the publicity given to his performances. Such holding respects the right of a performer to sell that which he may have spent years developing and refining. The Ohio court specifically held that plaintiff's public performance at the Burton Fair was not an abandonment (waiver) of his right of publicity, so as to permit defendant to film and broadcast his entire performance over his stated objection.

It is thus plain that plaintiff's complaint was, as a matter of state law, sufficient to state a claim upon which relief could be granted. The termination of the action by way of a summary judgment was by virtue of the Ohio Supreme Court's conclusion that defendant possesses a First Amendment privilege insulating it from liability.

While the opinion of the Ohio Supreme Court appears to speak in terms of a qualified immunity, in that two exceptions to the general rule of immunity are articulated, petitioner submits that in fact (and particularly as applied to this case) the effect of the ruling is to virtually totally insulate the broadcast media from liability. Of the two qualifications engrafted upon the basic immunity, one is a contradiction in terms while the other is a practical nullity.

The basic standard of immunity adopted by the Ohio Supreme Court is that the broadcast media "has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private". It is thereafter stated that such privilege can be lost if the "actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use". Disregarding the virtually insurmountable evidentiary problems this exemption would present, such proposition is a complete non-sequitur. If a broadcaster is entitled to claim the benefit of a First Amendment privilege upon a finding that the matter televised was of "public interest", there is simply no possibility of a further finding that the broadcast was "for some other private use" for purposes other than reporting in order to overcome that privilege. A finding that the broadcast was reporting of a matter of public interest would in and of itself preclude the conclusion that such a broadcast was an appropriation for private use. Hence, the very definition of the privilege precludes the existence of the qualification.

The second stated qualification is that immunity would not be recognized if "the actual intent was to injure the performer". While plaintiff would argue that in any case in which the broadcast media appropriates a performance

without compensation the law should imply intent to inflict a pecuniary injury (which is in fact the very basis of the right of recovery for an invasion of the right of publicity), it is plain that such was not the intent of the Ohio Supreme Court. If such a standard of intent was controlling, every case of appropriation (in which the media deprives the performer of his right to bargain for the sale of the reproduction of his act) would result in absolute liability. The very fact of the defendant's verdict in this case negates such possibility. Consequently, we must accept the view that intent to appropriate and intent to injure the performer are not corollaries, from which it necessarily follows that the Ohio Supreme Court envisioned a true subjective intent to injure. How could such intent be proved, particularly in response to the obvious argument that added public exposure necessarily benefits a performer? Petitioner submits that this amorphous possibility of a basis for recovery is of no real value whatsoever.

If, as petitioner contends, the rule of immunity adopted by the Ohio Supreme Court is virtually absolute the implications are staggering. It extends to the broadcast media carte blanche to appropriate and transmit all or parts of public performances without compensation to the performer. That eventuality is virtually invited by the Ohio Supreme Court's holding that any "standard which would bar the depicting [of] either an entire occurrence or an entire discrete part of a public performance" is constitutionally impermissible. Such an immunity goes far beyond any First Amendment privilege heretofore recognized by any court. It runs counter to admonitions from this Court regarding the sacrificing of individual rights in the name of freedom of the press. This Court has recognized the validity of the proposition that:

> Newspapers, magazines and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . they must pay the freight, and injured parties should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand. *Buckley v. New York Post Corp.*, 373 F.2d 175, 182. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967).

Justice Fortas, dissenting in *Time, Inc. v. Hill*, 385 U.S. 374, 420 (1967), expressed the matter thusly:

> The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press—whether forthrightly or by subtle indirection—in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be of no service to freedom of the press, but an invitation to public hostility to that freedom.

See also, Dietemann v. Time, Inc., 284 F. Supp. 925, 932 (C.D. Cal. 1968).

III. The First Amendment Privilege As Defined Under New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and Time, Inc. v. Hill, 385 U.S. 374 (1967), Is Not Applicable to the Defense of the Tort of Invasion of a Performer's Right of Publicity

As petitioner proposes to demonstrate, the rationale of the *New York Times v. Sullivan, supra,* and *Time, Inc. v. Hill, supra,* are simply not applicable to a case involving invasion of a performer's right of publicity. The Ohio Supreme Court was led into a misapplication of those decisions by viewing this action as but a simple continuation of the long-standing problem of resolving the conflicting interests of a "free press" and an individual's "right of privacy". The trap into which the Ohio Supreme Court has fallen in arriving at its decision is one of relying upon labels in a syllogistic line of reasoning[3]: this action presents a conflict between "free press" and "right of publicity"; the "right of publicity" is a part of the "right of privacy"; *Time, Inc. v. Hill* deals with the matters of "free press" and "right of privacy"; it therefore follows that the rule of *New York Times v. Sullivan* as applied in *Time, Inc. v. Hill* should apply in this case.

The fundamental error of the Ohio Supreme Court, which makes the foregoing line of reasoning only superficially attractive, is that it failed to recognize that while the "right of publicity" is sometimes categorized as a part of the "right of privacy", it has such distinctive attributes as to set it apart from other interests often lumped together

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3. Such an approach runs afoul of this Court's recent warning that in First Amendment cases "[w]hatever their general validity, use of such [generalized] subject matter classifications to determine the extent of constitutional protection afforded . . . may too often result in an improper balance between the competing interests". *Time, Inc. v. Firestone*, 424 U.S. 448, 47 L. Ed. 2d 154, 164 (1976).

under the general heading of the "right of privacy". It is those distinctions which call for the formulation of First Amendment standards specifically geared to the case at bar and others of a like nature.

Dean Prosser, in his review of the "right of privacy", concludes that it is not one tort, but a complex of four distinct kinds of invasion of four different interests which are tied together by a common name "but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff." PROSSER, LAW OF TORTS (4th Ed., 1971) p. 804. It is the failure to recognize the distinctiveness of the four separate torts which has led to confusion in decisional authorities. *Id.*, at p. 814.

While it has been said that for nearly twenty years the courts have been haunted by the "myth" that the tort of appropriation (which encompasses the right of publicity) involves an actual right of privacy, Pember and Teiter, *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L.R. 57, 88 (1974), there are several well-reasoned decisions which do observe the conceptual distinction which eluded the court below. One of the first cases in which the "right of publicity" was recognized is *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953), the court holding that such right was "in addition to and independent of" the classical right of privacy. The same conclusion was reached by the Third Circuit in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3rd Cir. 1955). An oft-cited decision in this area, in which the court found the distinction between the right of publicity and other torts classified under the right of privacy to be of controlling importance, is *Uhlaender v. Henrickson*, 316 F. Supp. 1277 (Minn. 1970). Quite recently it has been said:

> While much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy, the two rights are clearly separable. The protection from intrusion upon an individual's privacy, on the one hand, and protection from appropriation of some element of an individual's personality for commercial exploitation on the other hand are different in theory and scope. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975).

See also, Canessa v. J. I. Kislak, Inc., 97 N.J. Super. 327, 235 A.2d 62 (1967).

What are these fundamental differences of which the courts and commentators speak? They are essentially that the tort of appropriation, involves the commercial exploitation of a person before the public eye, whereas the traditional forms of invasion of privacy involve placing before the public either something theretofore secret or putting a "false light" upon facts previously known. PROSSER, *supra*, at p. 814.[4] The traditional forms of "right of privacy" do, in fact involve considerations of matter otherwise private. The "right of publicity" involves the usurpation of something already before the public.

Let us now consider the two authorities relied upon by the Ohio Supreme Court in order to determine whether their rationale is supportive of application to an action for invasion of right of privacy. While the primary authority drawn is *Time, Inc. v. Hill*, 385 U.S. 374 (1967), that ruling in turn draws from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). It is, therefore, appropriate that the inquiry start with the *New York Times* decision.

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4. The "false light" doctrine is somewhat akin to, though not necessarily identical with, the torts of libel and defamation.

In *New York Times* the plaintiff, a state police official, brought a state libel action, predicated upon a paid advertisement carried in the defendant's newspaper. The advertisement related to civil rights activities and, in part, was critical of certain police actions and public officials in Montgomery, Alabama. In the state court the plaintiff recovered a $500,000 jury verdict.

When the action came before this Court, the historical antecedents of the First Amendment privilege granted the press were reviewed. Based thereon the Court approached the merits of the action "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials". 376 U.S. 254, 270. Premised upon the reality that "erroneous statement is inevitable in free debate, and that it must be protected if the freedom of expression are to have the 'breathing space' that they 'need to survive' ", 376 U.S. 254, 271-272, the rule was articulated that a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless it is established that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.*, pp. 279-280. The Court noted that such conditional privilege was analogous to the privilege granted a public official when he is sued for libel by a private citizen, *id.*, p. 282, and observed that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship' ". *Id.*, p. 279.

The *New York Times* rule was extended beyond the limits of public officials in *Time, Inc. v. Hill*, 385 U.S. 374 (1967).[5]

The plaintiff therein instituted a "false light" suit under a New York civil rights statute which covered invasions of "right of privacy". Under that statute, as construed by the state courts, plaintiff was entitled to a recovery upon a showing of material and substantial falsification. *Id.*, p. 386. The factual predicate of the suit was that Life magazine had reported on the opening of a play, which was based on a book, which was based on an actual event. The book, however, was a fictionalized version of the actual events, and contained matter not responsive to the actual happenings. The magazine article made it appear as though the plaintiff had suffered through the events portrayed in the fictionalized version. In the trial court plaintiff recovered a judgment, which was affirmed on appeal in the state courts.

The plaintiff's judgment was vacated upon review by this Court. In an opinion expressing the views of five members of the court Justice Brennan found the principles of *New York Times* applicable. Premised upon the proposition that "the guarantees for free speech and press are not the preserve of political expression or comment upon public affairs", *id.*, at p. 388, the opinion holds that as to matters of "public interest" in "public personalities"

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5. Intervening between the *New York Times* and *Time, Inc.* decisions are the rulings in *Garrison v. Louisiana*, 376 U.S. 64 (1964), *Henry v. Collins*, 380 U.S. 356 (1965), and *Rosenblatt v. Baer*, 386 U.S. 75 (1966), in each of which the *New York Times* rule was applied to a fact situation involving criticism of public officials as to matters relevant to their public positions. It is worth noting that in *Rosenblatt* the court referred to the "motivating force" behind the *New York Times* decision as protection for the "strong interest in debate on public issues" and the strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues". *Id.*, at p. 85.

the "actual malice" standard of *New York Times* to be controlling. It is stated that:

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait. *Id.*, at p. 389.

The Court, however, took pains to note that the scope of the decision should not be read too broadly. It is stated that the application of the *New York Times* standard was not a matter of "blind application" but rather in the "discrete context" of the "application of the New York statute in cases involving private individuals". *Id.*, pp. 390, 391. It was further noted that "this is neither a libel action by a private individual nor a statutory action by a public official", *id.*, p. 390, and there is the suggestion that if such was the case a different standard than that of *New York Times* might be applied, the Court observing that in such cases the balancing of interests might call for consideration of the injured party's opportunity for rebuttal, and the state's interest in protection of the individual. *Id.*, p. 391. Justice Harlan, while concurring in the result, argued for the adoption of a less stringent standard than that of *New York Times*. He observed that the fact situation did not entail the "market place

of ideas" with which the court was historically concerned in First Amendment cases and that the plaintiff did not have an effective opportunity for rebuttal such as is available to a public official. *Id.*, at pp. 407-408.

The dissent of Justice Fortas, joined in by Chief Justice Warren and Justice Clark, finds the majority holding to be "exceedingly narrow", *id.*, p. 411. In urging affirmance, the opinion states:

> The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press—whether forthrightly or by subtle indirection—in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility to that freedom. This Court cannot and should not refuse to permit under state law the private citizen who is aggrieved by the type of assault which we have here and which is not within the specially protected core of the First Amendment to recover compensatory damages for recklessly inflicted invasion of his rights. *Id.*, p. 420.

Petitioner submits that it should be self-evident that the standards of *New York Times v. Sullivan* and *Time, Inc. v. Hill* cannot apply to this case.

Both *New York Times* and *Time, Inc. v. Hill* involved the dissemination of false information. In this case the

dissemination is of a visual reproduction, a matter of truthful reproduction.

In both rulings the Court was quite concerned with protecting open debate on matters of genuine public interest and concern, and the inhibiting effect of a reasonable man standard. We are here dealing with the appropriation of the art of a public performer, and seeking responsibility from the broadcast media in respecting individual rights.

The "actual malice" standard of *New York Times* permits of a recovery upon proof that defendant acted with knowledge that the publication was false or with reckless disregard for the truth. While in this case the defendant acted with total disregard for plaintiff's stated objections, the avenue for recovery open under the "actual malice" test is not here available for there is no issue regarding truth or falsehood.

New York Times involved a public official's public acts. *Time, Inc. v. Hill* turned upon the construction of a specific state statute in relation to the First Amendment. No such considerations are present in this action.

A partial rationale for the immunity extended in *Time, Inc. v. Hill* was the burden of absolutely verifying the accuracy of the information put before the public. In this case the defendant intentionally set out to capture an event as it occurred, and knew full well what it was obtaining.

Plainly, the "right of publicity" is not equitable with the "right of privacy" with which this Court dealt in *Time, Inc. v. Hill*, insofar as the burdens the media faces in knowing that it is dealing honestly and fairly with individuals to be portrayed are concerned. The considerations which underlie the immunity extended in *New York*

Times v. Sullivan and *Time, Inc. v. Hill* do not warrant permitting this defendant to appropriate for its own purposes the entirety of petitioner's performance without being called to account for its actions. The wrong done to petitioner is so far removed from any situation this Court has previously considered that it requires the formulation of a First Amendment standard responsive to the rights and obligations of the press specifically premised thereon.

IV. Time, Inc. v. Hill Has Been So Substantially Affected by Subsequent Decisions of This Court That Reliance Upon It Without Considerations of Those Rulings Is Erroneous

In this case the Supreme Court of Ohio terminated its consideration of the First Amendment privilege to be accorded defendant with *Time, Inc. v. Hill, supra*. Even assuming the "actual malice" standard of *New York Times* to be relevant to this case, the failure of the Ohio court to consider subsequent decisions interpreting *New York Times* and *Time, Inc. v. Hill*, renders the conclusion reached erroneous.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court passed upon two actions which had been accepted for review in order to consider the impact of *New York Times* upon persons who were "public figures" but not public officials. *Id.*, at p. 134. While agreeing upon the results in each action, the Court was unable to agree upon a standard to be adopted. Justice Harlan, in an opinion joined in by Justices Stewart and Fortas, was in favor of a standard which would permit the imposition of liability upon a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by re-

sponsible publishers". *Id.*, at p. 155. Other justices urged the application of the *New York Times* standard, while Justices Black and Douglas argued for abandonment of *New York Times* in favor of total immunity for the press from libel suits. *Id.*, at p. 172. In the opinion of Justice Harlan the following is found:

> . . . to take the rule found appropriate in *New York Times* to resolve the "tension" between the particular constitutional interest there involved and the interests of personal reputation and press responsibility [citation omitted] as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. *In Time, Inc. v. Hill, supra, 385 U.S. at 390, we counselled against "blind application of New York Times Co. v. Sullivan. . . ."* *Id.*, at p. 148. (Emphasis added.)
>
> The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. *Id.*, at p. 150.

The next significant decision of this Court was in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).[6] Its

6. Between the *Curtis Publishing* and *Rosenbloom* decisions the *New York Times* rule was applied in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), *Greenbelt Cooperative Publishing Assn. v. Bressler*, 398 U.S. 6 (1970), *Monitor Patriot v. Roy*, 401 U.S. 265 (1971), *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and *Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971). However, each of those actions involved considerations basically similar to those of the *New York Times* case itself.

importance does not lie so much in the holding, but rather in its subsequent repudiation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). As was the case in *Curtis Publishing Co. v. Butts, supra*, the action was concluded in this Court by a plurality The question presented upon which a majority of the justices could not agree was what First Amendment standard should apply in the case of a defamation action brought by an individual who was neither a public official nor a "public figure", but who was involved in a matter of "public concern". The judgment of the Court was rendered in an opinion by Justice Brennan, who wrote in favor of applying the *New York Times* "actual malice" test.

Within three years this Court decided the *Rosenbloom* issue contrary to the plurality opinion therein. *Gertz v. Robert Welch, Inc., supra.* In *Gertz* the plaintiff in a libel action was found to be neither a public official nor a public figure. Nevertheless, the district court, applying the *New York Times* standard, entered judgment in the defendant's favor. The court of appeals affirmed that ruling "because it read *Rosenbloom* to require the application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed". *Id.*, at p. 330. That ruling was reversed, this Court holding "that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them". *Id.*, p. 343.

In refusing to extend the *New York Times* standard to the case of a private individual the Court stated:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If

it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy on unconditional and indefeasible immunity from liability for defamation. [citations omitted]. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. *Id.*, at p. 341.

Among the considerations noted by the Court in determining to allow recovery under a standard less demanding than *New York Times* were, that a private individual does not have available the same channels of effective communication which a public official possesses in order to rebut falsehoods and that public figures are often voluntarily in the forefront of public controversies in order to influence their resolution, thus inviting attention and comment with the attendant risk that such may be false and damaging.[7] *Id.*, pp. 344-345. In assessing the plaintiff's status as a private individual the Court noted that he had neither accepted public office or assumed an influential role in ordering society. *Id.*, p. 345.

In determining to allow a private individual a remedy under state law under any standard which does not impose liability without fault, *id.*, p. 347, this Court abandoned

7. These considerations can, by analogy, be applied to petitioner. Once defendant has appropriated petitioner's entire act petitioner has no effective means of countering that conduct. While defendant's status as a public performer invites comment and criticism (favorable or unfavorable, true or false) it does not invite appropriation. If status as a "public performer" is to be equated with status as a "public figure" for First Amendment purposes no performer would be safe from having an entire performance appropriated without compensation.

as the determinative factor for application of the *New York Times* standard whether the material published concerned "an issue of public or general interest". In the majority opinion in *Gertz* the decision in *Time, Inc. v. Hill* was considered. The opinion states that in that case "the Court applied the *New York Times* standard to actions under an unusual state statute", and that such "holding was not an extension of *New York Times* but rather a parallel line of reasoning applying that standard to this discrete context". *Id.*, p. 334 (fn. 6). Petitioner submits that the overall import of the *Gertz* decision, and particularly these latter aspects thereof, are reflective of a narrowing back of the *New York Times* standard to virtually the context of the action in which it arose. More importantly, they contain a clear warning to other courts as to the limited initial scope of the *Time, Inc. v. Hill* decision and its continuing efficacy, a warning which was disregarded by the Ohio Supreme Court.

In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) and *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), this Court again cautioned against too broad readings of *New York Times* and *Time, Inc. v. Hill.*

In *Cantrell*, a "false light" case, the court found that liability was properly imposed under existing standards as applied to that action, but took the occasion to note that:

> . . . this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases. 419 U.S. 245, pp. 250-251.

A similar caution was extended in the *Cox Broadcasting* ruling, in which recovery was denied to a plaintiff alleging invasion of privacy by broadcast of matter derived from court records: "We should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph". 420 U.S. 469, 489. A fair reading of *Cox Broadcasting* fully reflects the narrowing of the *New York Times* standard effected by *Gertz v. Robert Welch, Inc., supra.* In fact, Justice Powell (concurring) in his review of decisional authorities observes that the *Gertz* decision "calls into question the conceptual basis of *Time, Inc. v. Hill*". 420 U.S. 469, 498.

The past term this Court refused to extend "the rather drastic limitations worked by *New York Times*". *Time, Inc. v. Firestone,* 424 U.S. 448, 47 L. Ed. 2d 154, 164 (1976). Justice Powell (joined by Justice Stewart) concurring, refers to the majority opinion therein as adhering to the principles of the *Gertz* decision. 47 L. Ed. 2d. 154, 169. Justice Brennan, dissenting, argues that the *Gertz* standards should not have been applied to the action under consideration, but recognizes that in *Gertz* the Court "cut back on the scope of application of the *New York Times* privilege as it had evolved through the plurality opinion in *Rosenbloom v. Metromedia, Inc.*" 47 L. Ed. 2d 154, 175.

It should be evident that the Ohio Supreme Court's application of the *New York Times* standard through *Time, Inc. v. Hill* without consideration of this Court's later rulings is a "blind application," as cautioned against by this Court almost ten years ago, and totally disregards the import of the latest constructions of the First Amendment by this Court. The doctrine of *New York Times* had its genesis in, and is being returned to, the protection

of the press to freely publish critical information regarding persons whose roles in society are of real importance to an informed citizenry. Petitioner submits that *Time, Inc. v. Hill* is an anomaly, the significance of which has been too broadly applied and the viability of which has been substantially undercut. It is time to do that which the Ohio Supreme Court did not, and recognize that in light of the *Gertz* decision *Time, Inc. v. Hill* has virtually no significance beyond its peculiar facts.

V. Specific First Amendment Standards Should Be Adopted Applicable to the Relationship of Public Performers and the Broadcast Media

As has been maintained throughout, petitioner's basic thesis is that the role of a performing artist and such an artist's right to control his or her art are so unique that the question of the broadcast media's First Amendment rights in relation thereto must be looked at anew. This is not to say that prior precedents are meaningless, but rather that they should be drawn upon taking into account the special nature of the performer's status.

While there is no doubt that a performing artist is a "public figure" in the sense that he or she is voluntarily in the public eye (and therefore is fair game for critical commentary on his or her talents under traditional First Amendment standards) such fact should not be justification for the broadcast media to be granted total immunity from liability for appropriating without permission and/or compensation the entirety of the performer's performance. What is called for in actions such as this is a First Amendment standard that will afford the broadcast media an opportunity to inform the public as to the presence and activities of a performer (with commentary thereon if desired) and yet which will respect the performer's right

to control the "right of publicity". A balance must be struck which will both grant the broadcast media reasonable First Amendment protection and demand of the broadcast media responsibility in respecting the rights of performing artists to market the talents they possess.

Petitioner submits that such a standard would fall somewhere between the "actual malice" test of *New York Times* applicable to public officials and the liability based upon any standard of fault test of *Gertz* applicable to private individuals. The existing classifications of "public figure" and "private individual", against which the press' rights and responsibilities have heretofore been measured, are inappropriate for incorporation into such a standard. As presently understood, a performing artist cannot be considered as coming within the ambit of either category. Petitioner would contend, however, that in defining a standard for the broadcast media's responsibility for appropriation of a performing artist's work the relevant considerations fall closer to that end of the spectrum pertaining to private individuals. The performing artist is a public figure only in the sense that he appears professionally before the public as an entertainer but he is not a public figure like a person who is active in social issues, political issues or other matters which generate public interest and commentary. He is truly a professional public entertainer who makes a living by selling his act which he created through his own talent and efforts.

The test which petitioner would espouse is essentially as follows: When a performing artist has a "right of publicity" guaranteed under state law the broadcast media may claim a First Amendment privilege for appropriation of all, or substantially all of a performance only if such act of appropriation is reasonably undertaken in discharge of the broadcast media's right and responsibility to inform

the public of the happening of a newsworthy event.[8] If the broadcast media goes beyond such bounds it should be answerable in damages, the measure of which would be controlled by state law, to the performer.

If such a standard was to be applied to this action it is manifest that questions of fact for a jury are presented. Such questions would include whether the broadcast and publication was of an event that was a newsworthy event constituting a matter of legitimate public interest, and did the publication constitute a verbatim re-creation of an entertainer's entire performance. If the matter published is not one that is newsworthy and a matter of legitimate public interest, then there can be no First Amendment privilege to publish matters otherwise private to which a right of privacy or right of publicity would otherwise attach. Likewise, if the publication was a verbatim re-creation of an entire performance of a professional public entertainer, then it represents an appropriation, or invasion of the right of publicity.

There may be occasions when these factual questions are determined in favor of the broadcast media, as when, for example, assume that the petitioner was shot out of his cannon and missed the net fracturing arms and legs. In that case the performance could become a newsworthy event of legitimate public interest justifying the publication of his entire act; or similarly, if Evel Knievel was to rocket-cycle over a tank of live man-eating sharks and didn't make it, the news media would probably be privileged to publish the re-creation of his last performance.

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8. The potential "chilling", self-censoring, effect of such a rule would be minimal. Petitioner submits that the instances in which the broadcast media, acting in a responsible fashion, would have to make a value judgment as to the capturing of an entire performance as part of news reporting should be few and far between.

Petitioner cannot improve upon the comment of Judge Day of the Cuyahoga County Court of Appeals in the within action where he stated (A33 of Petition):

> "Moreover the prospect of a total performance being captured on audio-visual tape without permission and then repeated on television without redress puts the consequences of such an appropriation of property in a rather appalling perspective."

The adoption of the rule which petitioner advances herein is not only for his benefit, but for the protection of all performing artists. There is no denying that the factual predicate of this action is novel. But the decision of the Ohio Supreme Court is not limited to the facts of this case and represents a substantial danger to the proprietary rights of every performing artist if it remains unchecked.

CONCLUSION

Petitioner submits that the ruling of the Ohio Supreme Court is plainly erroneous insofar as its First Amendment implications are concerned. Petitioner prays that this Court vacate the judgment of the Ohio Supreme Court, announce an appropriate First Amendment standard relevant to this action and others of a similar nature, and remand this action to the trial court for further proceedings. As the issues of state law in this suit have been resolved and the question presented is purely one of federal constitutional dimension a remand to the Ohio Supreme Court would serve no useful purpose.

Respectfully submitted,

JOHN G. LANCIONE
SPANGENBERG, SHIBLEY, TRACI
AND LANCIONE
1500 National City Bank Building
Cleveland, Ohio 44114
Attorneys for Petitioner